services in Chicago, Boston, Baltimore/Washington D.C., and upstate New York.[959] Through its recent acquisition of SNET, SBC provides cellular, PCS, and paging services in portions of New England.[960] SBC has also recently acquired Comcast Cellular Corp., which has cellular operations in the mid-Atlantic region and in the greater Chicago area.[961] Ameritech operates 42 cellular franchises, serving 3.5 million customers in markets totaling 20 million residents. In addition, Ameritech now offers PCS in the Cleveland and Indianapolis MTAs.[962] Ameritech also provides paging services to 1.5 million customers collectively within its five-state wireline territory, Minnesota and Missouri.[963]

2. Relevant Markets

520. Both parties provide mobile voice telephone service over cellular and PCS networks and two-way mobile data (CDPD) over cellular networks.[964] Ameritech currently provides cellular, paging, wireless data and security monitoring services in SBC's region.[965] Aside from its cellular operations, SBC's commercial offerings of wireless services in Ameritech's territory are limited to the resale of paging services. The Wireless Bureau has previously found that interconnected mobile voice telephone services, paging/messaging services, and two-way wireless data services constitute relevant product markets.[966] Hence, we examine the effects of the merger on the public interest in mobile voice telephone services, wireless data services, and paging services. We also address concerns raised with respect to commercial disputes involving wireless operations generally.

3. Mobile Voice Telephone Services

521. SBC and Ameritech both hold cellular telephone licenses in 14 cellular service areas in the greater St. Louis and Chicago metropolitan areas.[967] Thus, the proposed merger

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959 SBC/Ameritech July 24 Application, Description of Applicants and Their Existing Business, at 1.

960 *See infra* Section III.A. (The Applicants).

961 *See* In re Applications of Comcast Cellular Holdings, Co. and SBC Communications, Inc., *Memorandum Opinion and Order*, DA 99-1318, 1999 WL 446,562 (WTB 1999).

962 SBC/Ameritech July 24 Application, Description of Applicants and Their Existing Business, at 3; Cleveland launch news release: <http://www.ameritech.com/products/wireless/clearpath/mediakit/accpp010.htm>; Indianapolis launch news release: <http://www.ameritech.com/products/wireless/clearpath/mediakit/accpp032.htm>.

963 SBC/Ameritech July 24 Application, Description of Applicants and Their Existing Business, at 3.

964 SBC offers CDPD only in Connecticut and Rhode Island through SNET Cellular.

965 AT&T Oct. 15 Petition at 25.

966 *See* In re Applications of Vanguard Cellular Systems Inc. and Winston, Inc., *Memorandum Opinion and Order*, DA 99-481, 1999 WL 129,480 (WTB 1999); In re Applications of 360° Communications Company and ALLTEL Corporation, *Memorandum Opinion and Order*, 1998 WL 906,754 (WTB 1998); In re Applications of Pittencrieff Communications, Inc. and Nextel Communications, Inc., *Memorandum Opinion and Order*, 13 FCC Rcd 8935, 8940, para. 10 (1997); In re Application of Motorola, Inc. and American Mobile Satellite Corporation for Consent to Transfer of Control of Ardis Company, *Memorandum Opinion and Order*, 13 FCC Rcd 5182, 5187, para. 7 (WTB 1997).

967 Metropolitan Statistical Areas served by both SBC and Ameritech include: Chicago, IL, St. Louis, MO-IL, Gary-Hammond-East Chicago, IN, Springfield, IL, Champaign-Urbana-Rantoul, IL, Bloomington-Normal, IL,

implicates the Commission's cellular cross-interest rule, which generally prohibits an entity from holding a direct or indirect ownership interest in licensees for channel blocks in overlapping cellular geographic service areas ("CGSA").[968] The proposed merger also raises issues under the CMRS spectrum cap, which generally prohibits a licensee from having an attributable interest in more than 45 MHz of CMRS licensed spectrum in the same geographic area.[969] SBC/Ameritech have committed to divest one of the overlapping systems in each of these 14 Metropolitan Statistical Areas (MSAs) and Rural Service Areas (RSAs).[970]

522. On May 14, 1999, the Wireless Telecommunications Bureau, by delegated authority, announced that Ameritech had filed applications seeking Commission consent to transfer to GTE Consumer Services Inc. (GCSI) control of cellular properties that overlap with SBC and Comcast properties.[971] On August 20, 1999, the Bureau granted these applications.[972] Consummation of that transaction pursuant to this approval will remedy cellular cross-ownership and spectrum cap concerns raised by the SBC/Ameritech transaction. Therefore, we will grant this application subject to the condition that Ameritech closes its deal with GCSI before or simultaneous with the closing of the SBC/Ameritech transaction.

523. We note that Ameritech's divestiture of assets is also consistent with the DOJ Consent Decree entered into by Applicants in connection with this proposed merger. DOJ also reserved the right to approve the proposed buyer of the divested assets to ensure that the divestiture would not harm competition by substituting a less robust competitor.[973] This concern was also voiced by several parties who feared that Ameritech would attempt to impede competition by assigning its cellular licenses to one or more parties unable to compete effectively against the combined SBC/Ameritech.[974] DOJ has approved Ameritech's divestiture of the licenses to GCSI and we agree that competition would not likely be harmed in these wireless markets.[975] Thus, we find that the commenting parties' concerns have been addressed.

Decatur, IL. Rural Service Areas are: Illinois 2–Bureau, 3–Mason, 6–Montgomery; Missouri 8–Callaway, 12–Maries, 18–Perry, 19–Stoddard.

968 47 C.F.R. § 22.942. *See also* 47 C.F.R. § 20.6 (CMRS spectrum aggregation limit).

969 47 C.F.R. § 20.6.

970 SBC/Ameritech July 24 Application, Description of the Transaction at 58. Ameritech has been SBC's most formidable cellular competitor in St. Louis, with over 250,000 wireless subscribers, or about 10 percent of the total potential market of 2.5 million residents.

971 *See Public Notice*, Ameritech and GTE Seek FCC Consent to Transfer Control of Licenses from Ameritech to GTE, DA 99-920 (WTB May 14, 1999). We also note that Ameritech will be transferring control to GCSI of cellular properties that overlap with cellular properties that SBC recently acquired from Comcast. *See* In re Applications of Comcast Cellular Holdings, Co. and SBC Communications Inc., *Memorandum Opinion and Order*, DA 99-1318, 1999 WL 446,562 (WTB 1999).

972 *See In re Applications of Ameritech Corporation, Transferor, and GTE Consumer Services, Inc., Transferee, for Consent to Transfer of Control of Licenses and Authorizations*, Memorandum Opinion and Order, DA 99-1677, 1999 WL 635,724 (WTB 1999).

973 DOJ Final Judgment at 8.

974 *See e.g.*, AT&T Oct. 15 Petition at 25; CFA Nov. 16 Reply Comments at 3; Hyperion Oct. 15 Comments at 28.

975 In Section V.B.2.d)(1) (Competitive Effects on Mass Market Local Services) *supra*, we discuss the effects of these transactions in the broader market for telecommunications services generally in St. Louis.

4. Two-way Wireless Data Services

524. We find no basis for concern that the proposed merger will harm competition in the markets for wireless data services. First, SBC does not presently offer CDPD in any region where its cellular network overlaps that of Ameritech, so the proposed merger would not harm existing competition. Second, any concerns regarding the loss of potential competition are addressed by the divestiture of cellular assets as described above. Finally, no concern was raised by any commenter.

5. Paging Services

525. Some parties contend that we should not grant this application because SBC has failed to abide by the Commission's interconnection rules.[976] The Paging and Messaging Alliance of the Personal Communications Industry Association (PMA) submits that SBC continues to charge paging providers for SBC-originated traffic and refuses to pay compensation to paging carriers for terminating SBC-originated calls.[977] PMA also states that when SBC assumed control of Pacific Bell, negotiations with Pacific Bell regarding the terms of interconnection came to an immediate halt.[978] SBC reports that the issue of interconnection is a "good faith" dispute that is currently pending before a federal court, before the FCC and before the California PUC.[979] SBC believes that the reciprocal compensation provisions of the Act were intended to apply only to two-way communication.[980] Except in California, therefore, where a California PUC Order specifically addresses this issue, SBC does not pay reciprocal compensation for one-way paging. This matter is the subject of a separate proceeding at the Commission and need not be resolved in the context of this license transfer review.[981]

6. Other Competitive Issues

526. Several parties claim that we should not grant these applications because of pending disputes with SBC. We find, however, that none of these commenters has raised concerns that would preclude our grant of this application. Several commenters allege that SBC's acquisition of Ameritech may jeopardize the ability of AirTouch to provide "calling party pays" service.[982] However, the California PUC recently denied a petition by AirTouch to compel

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976 *See e.g.*, JSM Tele-Page Oct. 15 Petition at 1-2, Paging and Messaging Alliance of the Personal Communications Industry Association (PMA) Oct. 15 Petition at 4-11.

977 *Id.* at 4-9.

978 *Id.* at 10-11.

979 SBC Nov. 16 Reply Comments, App. B at 2.

980 *Id.* at 14-15.

981 *See* In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *Declaratory Ruling*; Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, *Notice of Proposed Rulemaking*, 14 FCC Rcd. 3689 (1999).

982 CoreComm Oct. 15 Comments at 7-9; Hyperion Oct. 15 Comments at 22-24; KMC Oct. 15 Comments at 18-20.

Pacific Bell to provide billing and collection for a CPP trial based on Pacific Bell's tariff for billing and collection of wireless services.[983] The denial was based on language in a prior California PUC decision prohibiting a LEC from billing its wireline customers at wireless rates for calls placed to wireless phones.[984] As we previously discussed in our order approving the SBC/SNET merger,[985] however, we find that this is not an appropriate forum for resolving these disputes.

B. International Issues

527. Subsidiaries of both SBC and Ameritech are authorized under section 214 of the Act to provide U.S. international service on an out-of-region basis.[986] Both SBC and Ameritech also have ownership interests in carriers that operate on the foreign end of U.S. international routes. Some of these interests rise to the level of an "affiliation" within the meaning of section 63.09. This application raises the issue whether the public interest would be served by permitting the merged entity to provide U.S. international service on these affiliated routes and, if so, under what terms. We consider first the foreign carrier affiliations of SBC and the issues raised by those affiliations in this transfer proceeding. We then consider the affiliations of Ameritech and issues raised by those affiliations.

1. SBC Foreign Carrier Affiliations

528. As a result of the merger, Ameritech's international carrier subsidiaries would become newly-affiliated with all of SBC's foreign carrier affiliates.[987] SBC's foreign carrier affiliates operate in South Africa (Telkom South Africa Ltd.) and Switzerland (diAx).[988] Ameritech holds section 214 authorization to serve each of these foreign points, and the Applicants request that we authorize a transfer of control of all of Ameritech's international authorizations to SBC.[989] Our approval of the Application thus would permit SBC-controlled

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983 *AirTouch Cellular v. Pacific Bell*, Decision 98-12-086, Case 97-12-044, Cal. Pub. Util. Comm'n (Dec. 17, 1998).

984 *Id.* at 2.

985 *SBC/SNET Order*, 13 FCC Rcd at 21306, paras. 28-29.

986 Upon consummation of the proposed merger, section 271 of the Act will prohibit any of SBC's or Ameritech's international carrier-subsidiaries from providing international services originating in any of their combined "in-region States," as that term is defined in section 271(i) of the Act, 47 U.S.C. § 271(i).

987 Section 63.09(e) provides, in relevant part, that: "Two entities are *affiliated* with each other if one of them, or an entity that controls one of them, directly or indirectly owns more than 25 percent of the capital stock of, or controls, the other one." 47 C.F.R. § 63.09(e).

988 *See* SBC/Ameritech July 24 International Application, at 9; Letter from Todd F. Silbergeld, Director, Federal Regulatory, SBC Communications Inc., to Magalie Roman Salas, Secretary, FCC (filed February 1, 1999) (SBC Feb. 1 *Ex Parte). See also* Letter from Philip W. Horton, Arnold & Porter, counsel to SBC, to Magalie Roman Salas, Secretary, FCC (filed July 2, 1999) (SBC/Ameritech July 2 *Ex Parte)* (amending SBC/Ameritech July 24 International Application, to delete VTR Inversiones as an affiliated carrier in Chile); Letter from Philip Horton, Arnold & Porter, counsel to SBC, to Susan O'Connell, International Bureau, FCC, (filed July 21, 1999) (SBC July 21 *Ex Parte*) (updating information relating to DiAx).

989 *See* SBC/Ameritech July 24 International Application at 6-9 (listing the international section 214 authorizations held by Ameritech and SBC), 10-11.

subsidiaries to serve these affiliated routes. This Application raises for our consideration the issue whether the public interest would be served by permitting SBC to provide U.S. international service between the United States and South Africa and Switzerland through its acquisition of control of Ameritech's international section 214 certificates. If we approve the proposed transfer of control of Ameritech's authorizations to SBC, we also must inquire whether SBC's affiliates in South Africa or Switzerland have sufficient market power to warrant classifying the combined entity's U.S. international carrier subsidiaries as "dominant" U.S. international carriers on either of these routes. We conclude that the public interest would be served by transferring control of Ameritech's international section 214 authorizations to SBC, subject to classification of SBC subsidiaries as dominant international carriers in their provision of service on the U.S.-South Africa route.

529. The rules and standards adopted in the Commission's *Foreign Participation Order* govern our decision whether, and on what terms, to authorize SBC to provide service on routes where SBC has affiliations with foreign carriers.[990] In that decision, the Commission adopted an open entry standard for applicants that request authority to serve a World Trade Organization (WTO) member country in which the applicants have a foreign carrier-affiliate. Previously, the Commission applied the "effective competitive opportunities (ECO)" test to certain applicants that sought to provide service on routes where an affiliated foreign carrier possessed market power.[991] In the *Foreign Participation Order*, the Commission eliminated the ECO test in favor of a rebuttable presumption that applications for international section 214 authority from applicants affiliated with foreign carriers in WTO member countries do not pose concerns that would justify denial of the application on competition grounds.[992] The Commission retained the ECO test for certain applicants that seek to serve non-WTO countries in which the applicant has an affiliation with a foreign carrier possessing market power.[993] The Commission also considers other public interest factors that may weigh in favor of, or against,

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990 *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market,* IB Docket Nos. 97-142 and 95-22, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891 (1997), *recon. pending* (*Foreign Participation Order*).

991 The "effective competitive opportunities (ECO)" analysis was developed and discussed in the *Foreign Carrier Entry Order*. *See Market Entry and Regulation of Foreign-Affiliated Entities*, IB Docket No. 95-22, Report and Order, 11 FCC Rcd 3873 (1995).

992 *Foreign Participation Order,* 12 FCC Rcd at 23906-10, paras. 33-43; *see also id.* at 23913-17, paras. 50-58. The Commission addressed in the *Foreign Participation Order* a specific competition concern: that a foreign carrier with market power in an input market on the foreign end of a U.S. international route has the ability to exercise, or leverage, that market power into the U.S. market to the detriment of competition and consumers. The Commission found that, because of the implementation of the WTO agreement on basic telecommunications services, foreign carriers in WTO member countries would rarely be able to harm competition in the U.S. market by acting anticompetitively. The Commission further noted its ability to impose specific conditions on a grant of authority. *Id.* at 23913-14, para. 51.

993 *Id.* at 23944-46, paras. 124-129; *see also id.* at 23949-50, paras. 139-142. Section 63.18(j)-(k) of the rules applies the ECO test where the applicant is a foreign carrier in the non-WTO country; or controls a foreign carrier in that country; or where any entity that owns more than 25 percent of the applicant, or controls the applicant, controls a foreign carrier in that country; or, in specified circumstances, where two or more foreign carriers own, in the aggregate, more than 25 percent of the applicant. 47 C.F.R. § 63.18(j)-(k).

granting an international section 214 application, including national security, law enforcement, foreign policy and trade concerns.[994]

530. Both South Africa and Switzerland are members of the WTO. Accordingly, we find that SBC is entitled to a presumption that its foreign carrier affiliations do not raise competition concerns that would warrant denial of its request to serve the U.S.-South Africa and U.S.-Switzerland routes through its acquisition of control of Ameritech's international section 214 certificates. We note that no party has filed comments that address specifically the international transfer application, and we find no public interest factors that would warrant denying SBC's request to acquire control of Ameritech's international section 214 authorizations.

531. We next examine whether it is necessary to impose our international dominant carrier safeguards on SBC's international carrier subsidiaries in their provision of service on these affiliated routes.[995] Under rules adopted in the *Foreign Participation Order*, we regulate U.S. international carriers as dominant on routes where an affiliated foreign carrier has sufficient market power on the foreign end to affect competition adversely in the U.S. market.[996] A U.S. carrier presumptively is classified as non-dominant on an affiliated route if the carrier demonstrates that the foreign affiliate lacks 50 percent market share in the international transport and local access markets on the foreign end of the route.[997] Section 63.18 of the rules requires SBC, as transferee in this proceeding, to demonstrate that it qualifies for non-dominant classification on any affiliated route for which it seeks to be regulated as a non-dominant international carrier. The Joint Application recognizes that SBC's affiliate in South Africa, Telkom South Africa Ltd., is the incumbent telecommunications carrier in South Africa, and unlike the case of its Switzerland affiliate, SBC does not assert that Telkom South Africa lacks market power. We therefore amend, effective upon consummation of the proposed merger with SBC, the international section 214 authorizations held by Ameritech Communications, Inc. (ACI), File Nos. ITC-96-441 and ITC-97-289, to apply dominant carrier regulation, as specified in section 63.10 of the rules, to its provision of the authorized services on the U.S.-South Africa route.[998]

532. We note that SBC and Ameritech subsidiaries currently have section 214 authority to resell the switched services of unaffiliated U.S. international carriers to South Africa and are classified as non-dominant in their provision of such service. We find that, upon

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994 *See Foreign Participation Order*, 12 FCC Rcd at 23919-21, paras. 61-66.

995 Our international dominant carrier safeguards are set forth in section 63.10(c) of the rules (*as amended in International Settlement Rates*, IB Docket No. 96-261, Report and Order on Reconsideration and Order Lifting Stay, FCC 99-124 (rel. June 11, 1999)).

996 *Foreign Participation Order*, 12 FCC Rcd at 23951-52, para. 144; 47 C.F.R. § 63.10(a)(3).

997 *See* 47 C.F.R § 63.10(a)(3).

998 The authorization granted in File No. 96-441 permits ACI to resell interconnected and non-interconnected international private lines on all U.S. international routes, except to Hungary, subject to limitations generally applied to U.S. international resale carriers. *See* 47 C.F.R. § 63.23. The authorization granted in File No. 97-289 permits ACI to provide international facilities-based services on all U.S. international routes, except Hungary, subject to limitations generally applied to U.S. international facilities-based carriers. *See* 47 C.F.R. § 63.22.

consummation of the merger, each of SBC's subsidiaries will warrant continued regulation as non-dominant providers of switched services to South Africa for so long as each provides such services only through the resale of unaffiliated U.S.-authorized carriers' switched services.[999] SBC subsidiaries are and will be required, however, to file quarterly reports of their switched resale traffic on this route.[1000]

533. We find that SBC has provided sufficient information to demonstrate that its affiliate in Switzerland lacks market power and that it therefore warrants non-dominant carrier treatment on the U.S.-Switzerland route. SBC represents that its affiliate lacks 50 percent market share in the international transport and local access markets in Switzerland,[1001] and there is no evidence in the record that contradicts this statement or otherwise suggests that SBC's affiliate has market power.

2. Ameritech Foreign Carrier Affiliations

534. Ameritech has investment interests in several foreign carriers that rise to the level of an affiliation under section 63.09 of the rules.[1002] Ameritech identifies the following foreign carrier affiliates: MATAV Rt (Hungary), Tele Danmark A/S (Denmark), Talkline (Germany and the Netherlands), BEN Netherland B.V. (the Netherlands), and UAB Mobilios Telekomunikacijos or "Bite" (Lithuania).[1003] In the case of Tele Danmark, Talkline, and Bite, Ameritech's investment interests constitute controlling interests.[1004]

535. As a result of the proposed merger, SBC would acquire indirectly Ameritech's ownership interests in MATAV, Tele Danmark, Talkline, BEN Netherlands and Bite. The controlling interests that SBC would acquire in Tele Danmark, Talkline, and Bite trigger a pre-merger notification requirement under section 63.11(a) of the rules. This provision requires, in relevant part, that authorized carriers notify the Commission sixty days prior to acquiring, directly or indirectly, a controlling interest in a foreign carrier.[1005] As explained in the *Foreign Participation Order*, the prior notification requirement of section 63.11 gives the Commission the opportunity to evaluate new affiliations under the entry standards adopted in that order.[1006]

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999 Section 63.10(a)(4) of the rules, 47 C.F.R. § 63.10(a)(4), establishes a presumption of non-dominance for carriers that provide switched services on affiliated routes solely through the resale of an unaffiliated U.S. facilities-based carrier's international switched services.

1000 *See* 47 C.F.R. § 43.61(c) (requiring carriers engaged in the resale of international switched services on routes where a foreign-carrier affiliate has market power and collects settlement payments from U.S. carriers to file quarterly reports of their switched resale traffic and revenues on the affiliated route).

1001 *See* SBC/Ameritech July 24 International Application, at 12; SBC July 21 *Ex Parte*.

1002 *See* 47 C.F.R. § 63.09.

1003 *See* Ameritech Notification of Foreign Affiliation Pursuant to section 63.11 of the Commission's Rules (dated Feb. 26, 1999); Letter from Christopher M. Heimann, Director of Legal Affairs, Ameritech, to Magalie Roman Salas, Secretary, FCC (filed July 15, 1999) (Ameritech July 15 *Ex Parte*).

1004 Ameritech July 15 *Ex Parte*.

1005 47 C.F.R. § 63.11(a).

1006 The Commission stated that "[t]he notifications will give us the opportunity to impose any conditions that we might deem necessary in a particular case. We might, for example, find in a particular case that an affiliation raises

536. In this case, section 63.11(a) directs us to determine whether, upon consummation of the proposed merger, it would continue to serve the public interest to allow SBC's carrier-subsidiaries to serve Denmark, Germany, the Netherlands and Lithuania, where SBC proposes to acquire controlling interests in foreign carriers as a result of its merger with Ameritech. Applying the entry standard of the *Foreign Participation Order*, we conclude that the public interest would continue to be served by SBC's provision of service, through all its authorized subsidiaries, on U.S. international routes to Denmark, Germany and the Netherlands. Each of these countries is a member of the WTO,[1007] and we find no other public interest factors that would warrant a different conclusion. SBC does not assert, however, that Tele Danmark lacks sufficient market power in Denmark to affect competition adversely in the United States. We therefore amend, effective upon consummation of the proposed merger with Ameritech, the international section 214 authorizations held by certain of SBC's currently authorized subsidiaries to apply dominant carrier regulation, as specified in section 63.10 of the rules, to their provision of the service on the U.S.-Denmark route.[1008] We note that ACI already is classified as a dominant carrier in its provision of service on this route.

537. We find that, after the merger, SBC subsidiaries would be subject to continued regulation as non-dominant carriers to Germany and the Netherlands. The record indicates that Talkline currently provides mobile communications services in Germany and resold cellular service in the Netherlands.[1009] As we have previously found in our 1998 Biennial Regulatory Review of international common carrier regulations, foreign carriers that operate solely on a resale basis, or that have only mobile wireless (and no wireline) facilities, are unlikely to raise market power concerns.[1010]

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anticompetitive concerns that must be addressed by imposing our benchmarks condition or the dominant safeguards we adopt here." *Foreign Participation Order*, 12 FCC Rcd at 24036, para. 333. Section 63.11(b) of the rules requires, in relevant part, that authorized carriers which acquire a non-controlling interest in a foreign carrier that otherwise meets the definition of an affiliation notify the Commission *within 30 days* of the investment. *See* 47 C.F.R. § 63.11(b). Thus, after the merger, SBC will be required to notify us of its acquisition of a non-controlling affiliation with MATAV and BEN Netherland. The Commission or the International Bureau, on delegated authority, will at that time consider further whether any change in regulatory status is warranted for SBC subsidiaries in their provision of service to Hungary or the Netherlands.

[1007] As we also find below, Talkline does not in any event have sufficient market power in Germany or the Netherlands to affect competition adversely in the United States.

[1008] The authorizations that would be amended are as follows: Pacific Bell Communications, File No. ITC-96-689; SBC Global Communications, Inc., File Nos. ITC-96-692 & ITC-98-423-T/C; Southwestern Bell Communications Services, Inc., File No. ITC-97-770 (renumbered ITC-214-19971108-00689); SNET America, Inc., File No. 96-172; and SNET Diversified Group, Inc., File No. 96-538. After the merger, each of these SBC subsidiaries would warrant continued regulation as non-dominant providers of switched services to Denmark for so long as each provides such services only through the resale of unaffiliated U.S.-authorized carriers' switched services. *See* 47 C.F.R. § 63.10(a)(4). *See also* 47 C.F.R. § 43.61(c).

[1009] *See* Ameritech July 15 *Ex Parte*.

[1010] *See 1998 Biennial Regulatory Review -- Review of International Common Carrier Regulations,* IB Docket No. 98-118, Report and Order, 14 FCC Rcd 4909 (1999), *recon. pending*; *id.* at 4922, para. 29.

538. Although SBC proposes to acquire Ameritech's controlling interest in Bite in Lithuania, which is not a member of the WTO, we find that the public interest would continue to be served by SBC's authorization to provide service on this route. Bite is authorized in Lithuania to provide mobile wireless service only.[1011] On this basis, and in the absence of any other evidence of market power, we conclude that Bite lacks sufficient market power to affect competition adversely in the United States.[1012] Accordingly, we find that SBC's investment is consistent with the entry policies adopted in the *Foreign Participation Order* for carriers from non-WTO countries.[1013] We also find that, after the merger, SBC subsidiaries would be subject to continued regulation as non-dominant international carriers between the United States and Lithuania.

C. Alarm Monitoring

1. Overview

539. The Alarm Industry Communications Committee (AICC) argues that, if SBC is permitted to take control of Ameritech's alarm monitoring business, by means of acquiring Ameritech, and makes it a wholly-owned subsidiary, SBC will be engaging in the provision of alarm monitoring services in violation of section 275(a)(1) of the Communications Act.[1014] For the reasons discussed below, we conclude that it is unnecessary to require Ameritech to divest its alarm monitoring assets as a condition to our approval of its merger with SBC. This conclusion is based on our determination that, if SBC and Ameritech were to consummate their planned merger without Ameritech divesting its alarm monitoring assets and ceasing to provide alarm monitoring service, the combined entity would not violate the prohibition in section 275(a)(1) against BOCs, other than those permitted by section 275(a)(2), providing alarm monitoring services for five years after the date of enactment of the Telecommunications Act of 1996. We therefore reject AICC's request that we precondition our merger approval on, among other things discussed below, Ameritech divesting its alarm monitoring assets and ceasing to provide alarm monitoring services.

540. The 1996 Act provides for delayed entry by BOCs into the alarm monitoring business until five years after the date of enactment. Specifically, section 275(a)(1) states: "[n]o Bell operating company or affiliate thereof shall engage in the provision of alarm monitoring services before the date which is 5 years after the date of enactment of the Telecommunications Act of 1996."[1015] Section 275 provides a grandfathering clause, however, allowing BOCs that were providing alarm monitoring service as of November 30, 1995, to continue doing so.

1011 *See* Ameritech July 15 *Ex Parte*; Letter from Christopher M. Heimann, Director of Legal Affairs, Ameritech, to Magalie Roman Salas, Secretary, FCC (filed Sept. 21, 1999).

1012 *See supra* n.1010 and accompanying text.

1013 *See Foreign Participation Order* at 12 FCC Rcd at 23949, para. 139 (applying the ECO test only to certain applicants that seek to serve non-WTO countries in which the applicant's affiliated foreign carrier *possesses market power*).

1014 *See* AICC Oct. 15 Comments at 2-4, citing 47 U.S.C. § 275(a)(1).

1015 47 U.S.C. § 275(a)(1).

Specifically, section 275(a)(2) states: "[p]aragraph (1) does not prohibit or limit the provision, directly or through an affiliate, of alarm monitoring services by a Bell operating company that was engaged in providing alarm monitoring services as of November 30, 1995, directly or through an affiliate."[1016] Section 275(a)(2) also states:

> [s]uch Bell operating company or affiliate may not acquire any equity interest in, or obtain financial control of, any unaffiliated alarm monitoring service entity after November 30, 1995, and until 5 years after the date of enactment of the Telecommunications Act of 1996, except that this sentence shall not prohibit an exchange of customers for the customers of an unaffiliated alarm monitoring service entity.[1017]

541. We note that the restriction in section 275(a)(1) applies to a BOC (such as the SBC BOCs or Ameritech BOCs) or BOC affiliate.[1018] The grandfathering exception in section 275(a)(2) also applies to a BOC or BOC affiliate. The alarm monitoring services at issue are provided by SecurityLink. SecurityLink currently is an affiliate of the five grandfathered Ameritech BOCs. After the merger, SecurityLink will also be an affiliate of the non-grandfathered SBC BOCs. For purposes of brevity, when we refer to "SBC" or "Ameritech" providing alarm monitoring services, or being grandfathered or exempt from the restriction against BOCs providing such services, we will in fact be referring to the SBC BOCs or Ameritech BOCs, or to SecurityLink as their affiliate.

542. The Commission has concluded in its rulemaking proceeding implementing section 275 that the scope of section 275(a)(2) is best addressed on a case-by-case basis in which

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1016 47 U.S.C. § 275(a)(2).

1017 *Id.*

1018 Section 153(4) defines a "Bell operating company": "The term 'Bell operating company' –

(A) means any of the following companies: Bell Telephone Company of Nevada, Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, Michigan Bell Telephone Company, New England Telephone and Telegraph Company, New Jersey Bell Telephone Company, New York Telephone Company, U S WEST Communications Company, South Central Bell Telephone Company, Southern Bell Telephone and Telegraph Company, Southwestern Bell Telephone Company, The Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac Telephone Company, The Chesapeake and Potomac Telephone Company of Maryland, The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of West Virginia, the Diamond State Telephone Company, the Ohio Bell Telephone Company, the Pacific Telephone and Telegraph Company, or Wisconsin Telephone Company; and

(B) includes any successor or assign of any such company that provides wireline telephone exchange service; but

(C) does not include an affiliate of any such company, other than an affiliate described in subparagraph (A) or (B)." 47 U.S.C. § 153(4)(A),(B)(C). Section 153(1) defines an "affiliate": "The term 'affiliate' means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term 'own' means to own an equity interest (or the equivalent thereof) of more than 10 percent. 47 U.S.C. § 153(1).

the Commission is able to consider all of the facts that may apply to a particular transaction.[1019] In that Order, the Commission found that, because Ameritech is the only BOC that was authorized to provide alarm monitoring service as of November 30, 1995, it is the only BOC that qualifies for "grandfathered" treatment under section 275(a)(2).[1020] Ameritech provides intraLATA alarm monitoring pursuant to an approved CEI plan[1021] and interLATA alarm monitoring services pursuant to a waiver of the Modification of Final Judgement.[1022] The Commission currently has pending before it several cases in which it has ordered Ameritech to show cause why it should not be required to divest Ameritech's purchases of unaffiliated providers of alarm monitoring service.[1023] On August 31, 1999, the Commission released an order denying Ameritech's request that the Commission forbear from applying section 275(a) of the Act to apply both to alarm monitoring service transactions already completed and to future transactions by Ameritech.[1024]

2. Analysis

a) "Engaged in the Provision" of Alarm Monitoring Services under Section 275(a)(1).

543. The first question we must consider is whether, by means of Ameritech being a wholly-owned subsidiary of SBC[1025] that provides alarm monitoring services through its affiliate, SecurityLink,[1026] SBC would be "engage[d] in the provision" of alarm monitoring services within the meaning of that term under section 275(a)(1). There is no dispute in the record that, if SBC acquires Ameritech, SecurityLink would remain a BOC affiliate (affiliated with the SBC BOCs, as well as the Ameritech BOCs) and would be "engage[d] in the provision of" alarm monitoring services within the meaning of the term in section 275(a)(1). SecurityLink would be under common ownership and control with the SBC BOCs and the Ameritech BOCs.[1027]

1019 *See Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, CC Docket No. 96-152, Second Report and Order, 12 FCC Rcd 3824, 3844, para. 44 (1997), *recons. pending* (*Alarm Monitoring Order*).

1020 *See Alarm Monitoring Order*, 12 FCC Rcd at 3839, para. 33.

1021 *See Bell Operating Companies Joint Petition for Waiver of Computer II Rules*, 10 FCC Rcd 13758, 13770 (Com. Car. Bur. 1995) (*CEI Plan Order*) (approving Ameritech's CEI plan for "SecurityLink" service).

1022 *See United States v. Western Electric Co.*, 46 F.3d 1198 (D.D.C. 1995).

1023 *See Enforcement of Section 275(a)(2) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, Against Ameritech Corporation, Motion for Orders to Show Cause and to Cease and Desist*, CCBPol 96-17, Memorandum Opinion and Order on Remand and Order to Show Cause, 13 FCC Rcd 19046, para. 1 (*Enforcement of Section 275(a)(2) Order on Remand)* and *Enforcement of Section 275(a)(2) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Against Ameritech Corporation, Memorandum Opinion and Order to Show Cause*, FCC 98-148 (rel. July 8, 1998), para. 1 (*Ameritech First Show Cause Order*).

1024 *See Petition of Ameritech Corporation for Forbearance from Enforcement of Section 275(a) of the Communications Act of 1934, as Amended*, Order, CC Docket No. 98-65 (rel. Aug. 31, 1999).

1025 *See* SBC/Ameritech July 24 Application, Description of the Transaction at 1.

1026 *See Alarm Monitoring Order*, 12 FCC Rcd at 3839, para. 33.

1027 *See* 47 U.S.C. § 153(1).

b) "Grandfathering" under Section 275(a)(2).

544. *Introduction.* Given that the SBC BOCs would indeed be "engage[d] in the provision of" alarm monitoring services under section 275(a)(1) through SBC's newly acquired affiliate, SecurityLink, we now consider whether SBC, by means of acquiring Ameritech, along with the Ameritech BOCs and their alarm monitoring subsidiary, also acquires Ameritech's grandfathered status under section 275(a)(2) such that the SBC BOCs would not be unlawfully "engag[ing] in the provision of" alarm monitoring services under section 275(a)(1).

545. We note that the varying interpretations in the record, described below, of whether a grandfathered BOC loses its exemption under section 275(a)(2) if the exempt entity is acquired by a non-grandfathered BOC demonstrates the need for Commission statutory interpretation. For example, AICC asserts that if SBC acquires Ameritech along with its SecurityLink alarm monitoring subsidiary, Ameritech's exemption under section 275(a)(2) to provide services through SecurityLink does not pass to SBC.[1028] Rather, according to AICC, once control of Ameritech passes to SBC, Ameritech "effectively loses its grandfathered status."[1029] Applicants respond that the opposite is true because, under Applicants' reading of that statute, "'control' simply is not a statutory condition for qualifying under section 275(a)(2) – a Bell operating company or its affiliate was either providing alarm monitoring services in 1995 or not."[1030] Applicants argue that because section 275(a)(2) creates a "permanent" exception for a BOC, like the Ameritech BOCs, that provided alarm monitoring services as of November 30, 1995, and because after the merger Ameritech, its operating companies, and SecurityLink all will continue to exist, the exemption under section 275(a)(2) "will continue to apply by its plain language."[1031] Applicants further argue that because SBC, once it acquires Ameritech, will become a "successor or assign" to Ameritech under section 153(4), it will be "a successor to Ameritech's interests," including its grandfathering rights to own SecurityLink.[1032] There is no dispute that Ameritech is entitled to its exempt status. For the reasons discussed below, we conclude that Ameritech does not lose its grandfathered status merely because of its acquisition by a BOC to whom the grandfathering exemption in section 275(a)(2) does not apply.

546. *Statutory Analysis.* Section 275 is silent on the issue of whether, when an alarm monitoring entity that is affiliated with a grandfathered BOC also becomes affiliated with a non-

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1028 *See* Letter from Steven A. Augustino, Counsel to the AICC, to Thomas Krattenmaker and Robert Atkinson, FCC, at 3, (April 13, 1999 *Ex Parte*).

1029 *See* AICC Oct. 15 Comments at 5. We note that the Michigan Consumer Federation argues that, in addition to being contrary to the intent of section 275, reading section 275(a)(2) to allow a transfer of grandfathering rights would "turn . . . on its head . . . the tradition of statutory 'grandfathering.'" Michigan Consumer Federation Oct. 15 Comments at 10.

1030 *See* SBC/Ameritech Nov. 16 Reply Comments at 89-90; *see also* Letter from Antoinette Cook Bush, Counsel for Ameritech, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 98-41, at 5 (filed April 28) (Ameritech April 28, 1999 *Ex Parte*).

1031 *See* Ameritech April 28, *Ex Parte* at 2-3.

1032 *See* SBC/Ameritech Nov. 16 Reply Comments at 90; Ameritech April 28, 1999 Ex Parte at 3-4.

grandfathered BOC, the exempt status of the grandfathered BOC transfers to the non-grandfathered BOC. The legislative history does not provide illumination on the matter. We must, therefore, examine the statutory purpose and structure of section 275 to give meaning to the scope of the restriction and exception thereto.[1033] Using the traditional tools of statutory construction, we look to the purpose of the Act, and section 275 in particular, to devise a reasonable interpretation of the applicability of the exemption in section 275(a)(2).[1034]

547. Although the legislative history does not speak to the applicability of grandfathering rights in section 275(a)(2) to the situation at hand, the legislative history does indeed shed some light on Congress' concern in deciding to impose a 5-year moratorium on BOC provision of alarm monitoring services, and on Congress' general purpose in grandfathering existing BOC provision of alarm monitoring services.

548. Congress, in enacting section 275, appeared concerned about ensuring a "level playing field" between the BOCs and the alarm monitoring industry.[1035] The Judiciary Committee Report on the Antitrust Consent Decree Reform Act of 1995 would have allowed a BOC to apply with the Department of Justice to provide alarm monitoring services 3 years after the date of enactment. It included an exception, however, "'grandfathering' any alarm monitoring services being provided by a Bell operating company on or before the date of enactment."[1036] In reasoning about the need for grandfathering, the Report stated: "[I]t is the intent of this Committee that any such company be permitted to manage and conduct their alarm monitoring services as would any other industry participant, without arbitrary restrictions on customer acquisition or growth of the business."[1037] It appears that Congress created this exception ultimately adopted in section 275(a)(2) in order not to burden companies currently providing alarm monitoring services by requiring them to sell that business.

1033 *See AT&T Corp., et al. v. Ameritech Corp.*, File Nos. E-98-41, E-98-42,E-98-43, Memorandum Opinion and Order, 13 FCC Rcd 21438, para. 35 (1998) (stating same in interpreting the meaning of the term "provide" in section 271(a)), *aff'd sub nom. US WEST Communications, Inc. v. FCC*, 177 F.3d 1057 (D.C. Cir. 1999).

1034 *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 n.9 (1984); *Bell Atlantic Telephone Companies v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997).

1035 *Enforcement of Section 275(a)(2) Order on Remand*, 13 FCC Rcd 19046, para. 14 and n. 54, *citing* H.R. Rep. No. 104-204, 104th Cong., 1st Sess., 87 (1995) ("[t]he state-of-art services provided by the alarm and telemessaging industries are dependent on the local telephone wires . . . [t]hese industries have had problems with the local telephone companies. On several occasions, the Federal Government has stepped in to ensure a level playing field. Thus, the concerns raised by the industry are real and not theoretical.") An earlier Senate report expresses similar concerns:

> [t]he services provided by the alarm industry are dependent upon the local telephone exchange monopoly. There is no practical reliable alternative. Given this fact and because this thriving small business industry would be highly susceptible to anticompetitive activities, the Committee believes that alarm companies would be placed in great jeopardy if the Bell Operating Companies were permitted to provide alarm monitoring services today.

See S. Rep. No. 103-367, 103rd Cong., 2nd Sess. at para. 7 (1994).

1036 *See* H.R. Rep. No. 104-203, 104th Cong., 1st Sess., 28 (1995).

1037 *See* H.R. Rep. No. 104-203 at 28.

549. We must construe the exception in a way that does not void it of any meaning. Engaging in this construction, we conclude that section 275(a)(2) is most reasonably interpreted not to require BOCs, such as the Ameritech BOCs, that were providing alarm monitoring services as of November 30, 1995 (and that are, therefore, explicitly permitted to continue providing such services) to sell their alarm monitoring affiliate and cease providing these services merely because that alarm monitoring affiliate also has become affiliated with non-exempt BOCs, such as the SBC BOCs. As Applicants point out, after the merger, Ameritech, notwithstanding that it will be a subsidiary of SBC, will continue to exist and the relationship among Ameritech, its BOCs, and SecurityLink will not change.[1038]

550. For the grandfathering provision in section 275(a)(2) to have any significance, Congress must have intended for the exemption in section 275(a)(2) to be a "permanent" one, as Applicants assert it is.[1039] We note that the Michigan Consumer Federation supports a requirement that Ameritech divest its alarm monitoring assets prior to merging with SBC, arguing that the nature of the grandfather provision is like a "snapshot," *i.e.,* we should only consider whether SBC was providing alarm monitoring services as of November 30, 1995.[1040] We believe, however, that a decision not to require Ameritech to divest its exempt alarm monitoring assets would preserve the "snapshot" nature of the section 275(a)(2) exemption as far as Ameritech is concerned. Forcing Ameritech to divest its alarm monitoring affiliate would effectively terminate the exemption for Ameritech.

551. As noted above, it appears that Congress created the exception in section 275(a)(2) in order not to burden companies providing alarm monitoring services by requiring them to sell their business. A requirement that Ameritech divest its alarm monitoring assets now would do just this. There would be no less of a burden now than Congress envisioned there would have been at the time it enacted the 1996 Act. Indeed, the burden may even be greater now, given that, in all likelihood, selling the business now would mean the loss of more customers than it would have three years ago.

552. Such an understanding of Congressional intent is supported by principles of statutory construction. In the instant case there is a potential conflict between sections 275(a)(1) and (a)(2) which we must resolve. Currently, SecurityLink is providing alarm monitoring services as an affiliate of the grandfathered Ameritech BOCs. After the merger, Security Link will also be an affiliate of the non-grandfathered SBC BOCs. Therefore, after the merger, SecurityLink will be providing alarm monitoring services both as an affiliate of BOCs subject to the section 275(a)(2) exemption from the general prohibition against BOCs or their affiliates providing alarm monitoring services and as an affiliate of BOCs subject to the general prohibition in section 275(a)(1). Because neither the statute nor the legislative history sheds light on how this apparent conflict might be resolved, we must resolve the conflict in a way that

1038 *See* Ameritech April 28 *Ex Parte* at 2-3.

1039 *See id.* at 2.

1040 *See* Michigan Consumer Federation Oct. 15 Comments at 10.

makes sense of the statute as a whole.[1041] For the reasons discussed below, we determine that, as a matter of statutory construction, the more specific exemption in section 275(a)(2) should prevail over the more general prohibition in section 275(a)(1). We believe this outcome is consistent with Congress' apparent intent not to burden BOCs currently engaged in the provision of alarm monitoring services by forcing them to sell their business.

553. The ultimate issue in assessing AICC's and Applicants' competing interpretations of section 275 is whether the rule in section 275(a)(1) or the exception in section 275(a)(2) is the more specific and, therefore, the controlling provision. As the Supreme Court stated in *Morales v. Transworld Airlines*, "it is a commonplace of statutory construction that the specific governs the general."[1042] In interpreting this canon, the Supreme Court more recently has stated: "[t] his Court has understood the present canon ('the specific governs the general') as a warning against applying a general provision when doing so would undermine limitations created by a more specific provision."[1043] We agree with Applicants that section 275(a)(2) is the more specific and hence controlling provision.[1044] An exception necessarily is more specific than the general rule to which it applies.[1045] Section 275(a)(2) is plainly an exception: it provides that "[p]aragraph (1) does not prohibit or limit the provision, directly or through an affiliate, of alarm monitoring services by a [grandfathered] Bell operating company."[1046] In addition, the proximity of sections 275(a)(1) and (a)(2) in the statute further support application of the rule that the more specific governs the general.[1047] We see no compelling reason to conclude that, in these circumstances, the general rule is more specific than the exception.

554. AICC argues that "acceptance of SBC and Ameritech's 'successor or assign' argument would significantly expand the grandfathering provision of Section 275(a)(2)."[1048] Applicants respond by pointing out that section 275 does not impose size limitations on alarm monitoring entities or on the geographic area in which a grandfathered BOC or BOC affiliate may provide alarm monitoring services.[1049] In this regard, nothing in section 275's language suggests that Congress was concerned about in-region discrimination by the BOC controlling the

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1041 *Cf. Bell Atlantic Telephone Companies,* 131 F.3d at 1045 (noting "potentially contradictory" provisions of section 272 of the 1996 Act and affirming the FCC's interpretation of section 272).

1042 *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992); *Busic v. United States*, 446 U.S. 398, 406 (1980).

1043 *Varity Corp. v. Charles Howe*, 516 U.S. 489, 511 (1996).

1044 *See* Ameritech April 28, 1999 *Ex Parte* at 3.

1045 *See Security Pac. Nat'l Bank v. Resolution Trust Corp.*, 63 F.3d 900, 904 (9th Cir.), *cert. denied*, 517 US 1103 (1995) ("Generally a more specific provision of an enactment prevails, in the sense of making an exception to, a more general provision), *citing* 2A Norman J. Singer, Sutherland Statutory Construction § 47.17 (5th ed. 1992) ("If the general words are given their full and natural meaning, they would include objects designated by the specific words, making the latter superfluous.").

1046 47 U.S.C. § 275(a)(2).

1047 *See HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981) ("[I]t is a basic principle of statutory construction that a specific statute . . . controls over a general provision . . . particularly when the two are interrelated and closely positioned . . . ").

1048 *See* AICC April 13 *Ex Parte* at 3.

1049 *See* Ameritech *April 28 Ex Parte* at 5.

bottleneck over the last mile: the general prohibition in section (a)(1) prohibits ownership of alarm monitoring services out-of-region as well as in-region, and the exception in section (a)(2) applies to in-region as well as out-of-region. In addition, as evidenced by section 271, Congress knew how to draft language to prevent BOCs from providing new in-region services, such as long distance, but did not follow this pattern in drafting section 275. Congress may have chosen to exclude most BOCs from the provision of alarm monitoring out of more general competitive concerns. As noted above, Congress, in enacting section 275, appeared concerned about ensuring a "level playing field" between the BOCs and the alarm monitoring industry.[1050] Adopting Applicants' interpretation of section 275 would not seem to undermine this purpose or indeed to affect the competitive balance at all. No more of the alarm monitoring industry would be affiliated with the BOCs than before.

555. It is under the rubric of specific statutory language trumping general statutory language that we address AICC's comparison of the instant situation with that in the Bell Atlantic/GTE merger. AICC argues that one reason we must require Ameritech to divest its alarm monitoring assets if it merges with SBC is to be consistent with the in-region interLATA issue in the pending Bell Atlantic/GTE license transfer application.[1051] AICC argues that the issues are similar because in both there is a transfer of obligations when an acquiring entity becomes a successor or assign of the acquired entity. AICC points out that Bell Atlantic and GTE recognize that GTE's freedom from restrictions on providing interLATA services does not extend to Bell Atlantic merely because Bell Atlantic would be acquiring GTE.[1052] If Bell Atlantic acquires GTE, Bell Atlantic would not succeed to GTE's interLATA authority, and Bell Atlantic's statutory restriction on entering the in-region interLATA market would govern the resulting combination.[1053] In AICC's view, just as GTE's freedom from in-region interLATA restrictions would not transfer to Bell Atlantic, and, therefore prevail over the restriction in section 271, the Ameritech BOCs' section 275(a)(2) grandfathered rights should not transfer to the SBC BOCs, and prevail over the restriction in section 275(a)(1).[1054] We disagree with AICC. Unlike section 275(a)(2) for alarm monitoring services, there is no specific exception in section 271 that trumps the general prohibition against BOCs providing in-region interLATA services. Therefore, the rule of statutory construction addressing specific and general language in a statute does not even come into play in the Bell Atlantic/GTE scenario.

556. We reject AICC's argument that, in effect, the Commission already has determined that the rule of section 275(a)(1) is the more specific provision that takes precedence over the exception in section 275(a)(2). In support of this contention, AICC cites the Commission's statement that "[s]ection 275(a)(2)... has no applicability to non-grandfathered

1050 *Enforcement of Section 275(a)(2) Order on Remand*, 13 FCC Rcd 19046, para. 14 and n. 54.
1051 *See* AICC April 13 *Ex Parte* at 3-4.
1052 *See id.*
1053 *See id.*; Ameritech April 28 *Ex Parte* at 5-6.
1054 *See* AICC April 13 *Ex Parte* at 3-4.

BOCs."[1055] Read in context, however, this statement does not support AICC's contention. The cited sentence concludes a discussion of what constitutes being "engage[d] in the provision of" alarm monitoring services for purposes of section 275(a)(1). In this context, the cited sentence indicates that section 275(a)(2)'s limitation on the steps that a grandfathered BOC may take to expand its business "has no applicability" in determining what constitutes "engag[ing] in provision of" alarm monitoring services under section 275(a)(1)'s prohibition. This portion of the Order has no bearing on whether section 275(a)(2) may otherwise be considered in determining whether a BOC is subject to the general prohibition on engaging in alarm monitoring or falls within the exception in section 275(a)(2).

3. AICC Motion on Smith Alarm

557. We note that AICC also filed a motion requesting that the Commission require Ameritech and SBC to submit to the Commission, and to make available to others pursuant to the protective order in this proceeding,[1056] all documents relating to their relationship with Smith Alarm Systems, Inc. (Smith Alarm), an unaffiliated, privately-held alarm monitoring service provider based in Dallas, TX, that, according to AICC is the 15th largest provider of alarm monitoring services, with annual revenues exceeding $32 million.[1057] AICC asserts that it:

> is concerned by published reports and recent statements by Ameritech executives which confirm that: Ameritech has paid a reported $6 million for an option to purchase Smith Alarm in March 2001, at a price which already has been negotiated; and Ameritech has agreed to bankroll Smith Alarm in pursuing additional alarm monitoring acquisitions.[1058]

AICC also asserts that it "believes that Smith Alarm has an explicit or implicit agreement to purchase any assets that Ameritech is required to divest as a result of FCC orders – assets which, as a result of Ameritech's option to purchase Smith Alarm, would soon return to Ameritech."[1059] AICC is concerned that, given these arrangements, even if the Commission were to require Ameritech to divest its alarm monitoring assets as a precondition to approval of the SBC/Ameritech merger, any divestiture would be a sham.[1060] AICC also argues that, in addition, "Ameritech's option/lending arrangement [with Smith Alarm] is itself a violation of Section 275

1055 *See* AICC Oct. 15 Comments at 4-5, citing *Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services,* Second Report and Order, 12 FCC Rcd 3824, 3843 at para. 33 (1997).

1056 *See Order Adopting Protective Order*, DA 98-1952.

1057 *See* AICC Motion to Require Full Disclosure of Relationship with Smith Alarm, (filed Dec. 3, 1998) (AICC Dec. 3 Motion) at 1, 4.

1058 AICC Dec. 3 Motion at 3-4, Exh. A, Oloroso, "Rivals Sound Ameritech Alarm: A Ploy to Get Around a Ban on Security Firm Deals?," Crains Chicago Business, November 23, 1998, at 1.

1059 AICC Dec. 3 Motion at 5.

1060 *Id.* at 5-6.

. . . by giving Ameritech 'financial control' over an unaffiliated alarm monitoring service entity."[1061]

558. Applicants, in addition to responding that AICC's allegations are incorrect, also argue that Ameritech's business relationship with Smith Alarm is not relevant to this merger proceeding.[1062] First, Applicants assert that Ameritech has not entered into a loan agreement with Smith Alarm, and that the article to which AICC refers does not state as much.[1063] Applicants also deny that Smith has agreed to purchase any assets which Ameritech is ordered to divest.[1064] Ameritech further argues that, consistent with previous Commission determinations, a merger proceeding is not the proper forum to address issues such as these which are related to effective enforcement of section 275.[1065] In support of their proposition, Applicants cite to, among other things, the *MCI WorldCom* Order.[1066] Applicants assert that "even when an argument may 'raise []serious concerns,' the Commission has refused 'to delay consummation of [a] merger in order to resolve them.'"[1067]

559. We need not, and cannot on this record, reach a conclusion on the merits of AICC's concern about Ameritech's involvement with Smith Alarm. We agree with Applicants that issues such as these are not appropriate for resolution in the context of a merger proceeding. We note that, for purposes of this merger proceeding, the result is the same – issues such as those relating to Ameritech's ties to Smith Alarm, or any other alarm monitoring entity, are better addressed in a separate proceeding, with a full record developed on the relationship with a particular alarm monitoring entity. As a result, therefore, we will state the obvious – that we expect, once SBC and Ameritech merge, that the combined entity will abide by the Communications Act, including section 275, and all Commission rules.

D. Cable Overbuild Issues

560. A few commenters express concern that SBC may discontinue Ameritech's cable overbuilds operated by Ameritech New Media (ANM), thereby reducing competition in the video services market after the merger.[1068] Sprint also asserts that the proposed transfer is unlawful under section 652 of the Communications Act.[1069] We address these issues below.

1061 *Id.* at 6-8.

1062 *See* SBC/Ameritech Opposition to Motion to Require Full Disclosure of Relationship with Smith Alarm (filed Dec. 16, 1998) (SBC/Ameritech Dec. 16 Opposition to Motion) at 1-3.

1063 *See* SBC/Ameritech Dec. 16 Opposition to Motion at 2-3.

1064 *See id.* at 3.

1065 *See id.* at 3-4.

1066 *See MCI/WorldCom Order*, 13 FCC Rcd at 18117-118, para. 161.

1067 SBC/Ameritech Dec. 16 Opposition to Motion at 3, quoting *WorldCom/MCI Order*, 13 FCC Rcd at 18117-118, para. 161.

1068 *See* Consumer Coalition Oct. 15 Comments at 16; NATOA Oct. 15 Comments at 1-2; Sprint Oct. 15 Petition at 42, 44.

1069 Section 652 prohibits local exchange carriers from acquiring more than a 10% financial interest in cable operators that provide cable service within the LEC's telephone service area. 47 U.S.C. § 572.

561. *Cable Overbuilds.* Sprint notes that SBC has not addressed its plans with respect to Ameritech's significant in-region cable overbuilds.[1070] Sprint and others cite SBC's discontinuance of cable operations in the past as cause for concern that SBC will cease ANM's cable overbuilds in the Midwest.[1071] SBC responds that the merger will merely change the ultimate corporate parent of ANM from Ameritech to SBC, and will not affect the obligations of ANM to manage and operate its cable systems. Further, SBC states that it has made no plans regarding changes to ANM or its operations, and that it intends to evaluate ANM's ongoing performance once detailed post-merger planning can occur.[1072]

562. We conclude that the possible discontinuance of ANM's cable overbuilds does not raise issues cognizable under the antitrust laws or the Commission's public interest standards under sections 214(a) and 310(d).[1073] Further, speculation about a possible future decision by SBC to exit the cable business is not triggered by the structure of any ownership changes that will occur because of the transfer. Rather, the issue arises solely based on historical evidence that SBC may have different business plans than Ameritech. We decline to extend our public interest analysis to dictate the merged entity's cable business strategy.

563. *Section 652.* Sprint contends that section 652 bars SBC from acquiring, as part of the merger, any cable systems operated by Ameritech because SBC's telephone service area will include Ameritech's telephone service area after the merger.[1074] Section 652 of the Communications Act, entitled "Prohibition on Buy Outs,"[1075] was enacted as part of the 1996 Act.[1076] Section 652(a) states that no "local exchange carrier or any affiliate of such carrier owned by, operated by, controlled by, or under common control with such carrier may purchase or otherwise acquire directly or indirectly more than a 10 percent financial interest, or any management interest, in any cable operator providing cable service within the local exchange

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1070 An "overbuild" occurs when two or more wireline cable television systems directly compete for subscribers in a local video programming delivery market. *See In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket 98-102, 13 FCC Rcd 24284, 24293 at para.14, n11, FCC 98-335, released Dec. 23, 1998 *(5th Annual Competition Report)*. Ameritech describes itself as the largest cable overbuilder in the country. Ameritech has acquired 87 cable franchises within its service regions in Illinois, Michigan, Ohio, and Wisconsin, with 72 of these cable franchises operational as of December 1, 1998. Ameritech serves 200,000 subscribers through these systems, and has the potential to pass more than 1.5 million homes through its 87 cable franchises. Ameritech was recently ranked 35th among the top 50 Multiple System Operators (MSO) in the country. *See* 5th Annual Competition Report at paras. 110, 111, 113; *see also* NCTA, *Top 50 MSOs,* Cable Television Developments, Summer 1999.

1071 SBC sold PacTel's competitive video distribution service after the SBC/PacTel merger despite pre-merger assurances that it would not do so. *See* Sprint Oct. 15 Petition at 42, n62. Commenters also refer to SBC's discontinuance of its cable operations in the Washington D.C. area and in Richardson, Texas. *See* Consumer Coalition Oct. 15 Comments at 16; NATOA Oct. 15 Comments at 2; Sprint Oct. 15 Petition at 42, 44.

1072 *See* SBC/Ameritech Nov. 16 Reply Comments at 87.

1073 47 U.S.C. §§ 214(a), 310(d).

1074 *See* Sprint Oct. 15 Petition at 44-46.

1075 47 U.S.C. § 572.

1076 At the same time, the 1996 Act repealed former section 613(b) which had prohibited a common carrier from providing video programming directly to subscribers in its telephone service area. 1996 Act, § 302(b)(1).

carrier's telephone service area."[1077] Section 652(b) places a corresponding prohibition on cable operators.[1078]

564. We conclude that section 652 is not applicable to the proposed transaction.[1079] Ameritech, as an incumbent LEC, has begun overbuilding incumbent cable operators in its telephone service region. SBC, as the acquiring incumbent LEC, would not be acquiring the local cable operator in these areas, but simply would stand in Ameritech's shoes as an incumbent LEC offering competing service.[1080] Congress was not opposed to the provision of cable service by a LEC, Congress simply did not want that provision of service to occur by the acquisition of the local cable operator.[1081] If a LEC chooses to provide video programming on its own, the LEC is not prohibited. Likewise, a LEC is not prohibited from choosing to construct a new system to provide programming or services, even with the local cable operator.[1082] Ameritech has built its own cable systems. The merged entity will continue to own those same cable systems. SBC acquires Ameritech's cable overbuilds as part of the very same transaction in which SBC's telephone service area expands to include Ameritech's local exchange carrier operations. Accordingly, SBC is not making any purchase or acquisition of a cable operator that would constitute a prohibited buyout under section 652.

E. Service Quality Issues

565. A number of commenters raise concerns regarding potential service quality problems resulting from the merger. These parties generally argue that service quality data and anecdotal evidence regarding Pacific Bell's performance in California demonstrate that mergers among large incumbent LECs adversely affect the public interest by hampering the delivery of

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[1077] 47 U.S.C. § 572(a). The definition of "affiliate" for the purposes of this section was considered in *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, 5335-36, at para. 91, FCC 99-57, released March 29, 1999 (*Cable Reform Order*). In the *Cable Reform Order*, the Commission decided to refer the consideration of the definition of "affiliate" to the pending proceeding in CS Docket 98-82. *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Review of the Commission's Cable Attribution Rules,* Notice of Proposed Rulemaking, 13 FCC Rcd 12990 (1998).

[1078] Section 652(b) states that "[n]o cable operator or affiliate that is owned by, operated by, controlled by, or under common ownership with such cable operator may purchase or otherwise acquire, directly or indirectly, more than a 10 percent financial interest, or any management interest, in any local exchange carrier providing telephone exchange service within such cable operator's franchise area." 47 U.S.C. § 572(b). The legislative history of section 652 indicates that Congress was concerned with "limiting acquisitions and prohibiting joint ventures between local exchange companies and cable operators that operate in the same market to provide video programming to subscribers or to provide telecommunications services in such market." S. Rep. No. 104-230, at 379 (1996).

[1079] Further, forced divestiture would not be in the public interest because cable overbuilds help to promote video competition.

[1080] *See* SBC/Ameritech Nov. 16 Reply Comments at 85-87.

[1081] Congress' main concern in enacting section 652, as indicated by the legislative history, was to avoid having a LEC purchase a local cable operator and thus control both wires to consumers. S. Rep. No. 104-230, at 379 (1996).

[1082] In enacting section 652, Congress repealed its prior prohibition against the provision of video programming by a common carrier and it chose not to prohibit LECs from building facilities to provide video programming even as joint ventures with local cable companies. S. Rep. No. 104-230, at 379 (1996).

service to consumers.[1083] SBC objects to these arguments, and provides a variety of information to demonstrate that its earlier merger with PacTel resulted in improved service quality.[1084]

566. As a general matter, service quality information consists of data regarding the provisioning of telecommunications services, the maintenance and repair of telecommunications equipment and facilities, the frequency of various types of network trouble, trunk blockage, switch outages, and the performance of the local loop.[1085] The Commission has traditionally relied on monitoring the quality of telecommunications service to ensure that consumers enjoy high quality, rapid communications.[1086] Through the annual Automated Reporting Management Information System ("ARMIS") filing requirements, price cap incumbent LECs submit data depicting the quality of service provided to their customers.[1087] In addition to the ARMIS reporting requirements, carriers report to the Commission information about the frequency and scope of network outages.[1088] Commenters point to formal and informal complaint rates to support their claims that PacTel's service deteriorated after its merger with SBC.[1089] SBC and Pacific Bell's ARMIS data suggest that there were some service quality problems in the PacTel regions following the SBC/PacTel merger. For example, Pacific Bell reported an average repair time of 38.8 hours for 1997, which is below its premerger performance of 29.3 hours, and its 1998 ARMIS submissions showed continued problems with repair time.[1090] In February 1999,

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[1083] *See* CoreComm Oct. 15 Comments at 9-10; Consumer Coalition Oct. 15 Comments at 20-21; Focal Oct. 15 Comments at 6-8; Hyperion Oct. 15 Comments at 24-25; KMC Oct. 15 Comments at 20-21; Level 3 Oct. 15 Comments at 22-23. *See also* The California Office of Ratepayer Advocates, Public Utilities Commission (ORA) December 16 *Ex Parte* at 2; Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corporation, Transferor, to SBC Communications. Inc. Transferee, CC Docket No. 98-141, En Banc Hearing, Prepared Statement of Regina Costa on Behalf of The Utility Reform Newtork (TURN) (December 14, 1998), ("*Costa Prepared Statement*") at 2.

[1084] *See* SBC/Ameritech July 24 Application, Kahan Aff. at paras. 96-98 & Attach.'s D,E, & F; SBC/Ameritech Reply Comments, App. B at 26; SBC Feb. 23 *Ex Parte;* SBC April 14 *Ex Parte*; SBC May 3 *Ex Parte.*

[1085] *See e.g.* Bellcore, SR-2275, Notes on the Networks §§ 5.4, 7.11, 8.1-8.11, 10.1-10.2 (1997); *see also* R.F. Rey (Tech Ed.), Engineering and Operations in the Bell System 571-602, 663-84 (2nd ed. 1984).

[1086] *See LEC Price Cap Order* at paras. 332-364.

[1087] *See* Policy and Rules Concerning Rates for Dominant Carriers, *Memorandum Opinion and Order*, 6 FCC Rcd 2974 (Com. Car. Bur. 1991) ("*Service Quality Order*"), *recon.*, 6 FCC Rcd 7482 (Com. Car. Bur. 1991).

[1088] *See* Amendment of Part 63 of the Commission's Rules to Provide for Notification by Common Carriers of Service Disruptions, *Report and Order*, 7 FCC Rcd 2010 (1992) ("*Network Outage Order*"), *Second Report and Order*, 9 FCC Rcd 3911 (1994) ("*Network Outage Second Report and Order*"), *modified on recon., Order on Reconsideration*, 10 FCC Rcd 11764 (1995) ("*Network Outage Report Recon*"). All communications common carriers are required to report network outages affecting 30,000 customers for 30 minutes or longer. *See* 47 C.F.R. § 63.100.

[1089] Several commenters maintain that the level of service quality deteriorated following the SBC/PacTel merger and that customer complaints related to service quality substantially increased. The most serious problems reported involved delays in service installations and missed appointments. *See* Costa Prepared Statement at 2; Consumer Coalition Oct. 15 Comments at 20-21; CoreComm Newco Oct. 15 Comments at 9-10; Focal Oct. 15 Comments at 6-8; Hyperion Oct. 15 Comments at 24-25; KMC Oct. 15 Comments at 20-21; Level 3 Oct. 15 Comments at 22-23.

[1090] *See* ARMIS 43-05 Service Quality Report, Table II, Row 0145. PacTel's 1998 reported repair times stood at 34.7 hours. Applicants state that PacBell recognizes that the informal complaint rate has increased since 1996, and is making efforts to reduce the number of complaints. Applicants further note that variations in complaint rates

SBC submitted additional information on the record, some of which further corroborated the service quality concerns,[1091] and some of which showed improvement.[1092]

567. We reject claims that we should prohibit these license transfers because of speculation that service quality in the Ameritech region will deteriorate as a result of the merger. Evidence in the record reveals that SBC has increased its commitments to improving service quality by hiring more employees, investing in infrastructure, and adopting enhanced operating practices.[1093] We conclude that these commitments and the further commitments proffered by SBC and Ameritech in supplementing the instant application sufficiently mitigate the service quality concerns raised in the record. The commitments proffered by SBC and Ameritech include several measures designed to prevent potential service quality degradation after the merger. Moreover, we anticipate that the quarterly reporting requirements, which are based on recommendations from the states, will provide the Commission, state public service commissions, and the public with key service quality data in a timely manner. In this way, we expect that these conditions will assist the states in promoting a high quality telecommunications service by providing uniform information.[1094] Further, providing the service quality data will assist the Commission in taking appropriate action in the event we find that service quality suffers after the merger.

F. Public Interest Issues Involving SBC's Acquisition of the Ameritech Licenses and Lines

568. Section 310(d) of the Communications Act provides that no station license may be transferred, assigned, or disposed of in any manner except upon a finding by the Commission that the "public interest, convenience and necessity will be served thereby."[1095] Among the factors that the Commission considers in its public interest inquiry is whether the applicant for a

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are due in large part to variables outside of PacBell's control, such as slamming by third parties and weather conditions. *See* SBC/Ameritech Nov. 16 Reply Comments, App. B at 26.

[1091] *See* SBC Feb. 23 *Ex Parte* at 2. SBC's revised data showed increased repair time averages: (1) its 1997 performance showed a 40.7 hour average repair time in California, and (2) its 1998 performance showed a 43.6 hour repair time, almost double the RBOC average repair time of 22.8 hours for 1997.

[1092] SBC's 1998 pre-filing data showed some improvement in installation times in 1998 over its 1997 performance. SBC's additional information also indicated that its switch performance improved after the merger. In 1996 and 1997, Pacific reported that 134 and 138 switches experienced outages respectively. In its pre-filing ARMIS data, Pacific indicates that only 106 switches experienced downtime during 1998. *See* SBC Feb. 23 *Ex Parte* at 3.

[1093] *See* SBC Feb. 23 *Ex Parte.*

[1094] In March 1998, the National Association of Regulatory and Utility Commissioners ("NARUC") recommended that the Commission work closely with the states to promote high quality service. To do this, NARUC recommended implementing a service quality monitoring program. Specifically, NARUC recommended that we update our service quality monitoring program to account for technological and regulatory developments in the telecommunications industry, to collect service quality information on a more frequent basis than the current annual requirement, and to make service quality information easily accessible on the Internet. *See* NARUC Resolution No. 2, Resolution Regarding a Federal Service Quality Reporting Program, Winter Meeting, March 1998.

[1095] 47 U.S.C. § 310(d).

license has the requisite "citizenship, character, financial, technical, and other qualifications."[1096] The Commission has previously determined that, in deciding character issues, it will consider certain forms of adjudicated, non-FCC related misconduct that includes: (1) felony convictions; (2) fraudulent misrepresentations to governmental units; and (3) violations of antitrust or other laws protecting competition.[1097] With respect to FCC-related conduct, the Commission has stated that it would treat any violation of any provision of the Act, or of the Commission's rules or polices, as predictive of an applicant's future truthfulness and reliability and, thus, as having a bearing on an applicant's character qualifications.[1098] In prior incumbent LEC merger orders, the Commission has used the Commission's character policy in the broadcast area as guidance in resolving similar questions in transfer of licenses proceedings.[1099]

569. A number of commenters maintain that SBC has a history of vigorously resisting competition in its existing monopoly markets.[1100] These commenters assert that approval of the merger will enable SBC to expand the reach of this corporate culture to the five-state Ameritech region. Other commenters maintain that SBC has engaged in "endless litigation and frivolous appeals" designed to delay state regulatory commission decisions.[1101] The record is replete with

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1096 *See SBC/SNET Order* 13 FCC Rcd 21305, at para *26.*

1097 *See Bell Atlantic/NYNEX Order* 12 FCC Rcd 20092-93, at para. 236.

1098 *Policy Regarding Character Qualifications in Broadcast Licensing,* 102 FCC 2d 1179, 1209-10 at para. 57 (1986) ("*Character Qualifications*"), modified, 5 FCC Rcd. 3252 (1990) ("*Character Qualifications Modification*"), *recon. granted in part,* 6 FCC Rcd 3448 (1991), *modified in part,* 7 FCC Rcd 6564, (1992) ("*Further Character Qualification Modification*"); *MCI Telecommunications Corp.*, 3 FCC Rcd 509 (1998) (stating that character qualifications standards adopted in the broadcast context can provide guidance in the common carrier context). The Commission has also determined that allegations that an applicant has engaged in unreasonable or anticompetitive conduct is relevant to the Commission public interest analysis *SBC/SNET Order* 13 FCC Rcd 21306-07, at paras. 28-30.

1099 *See SBC/SNET Order* 13 FCC Rcd 21305 at para. 26; *Bell Atlantic/NYNEX Order* 12 FCC Rcd 20092-93, at para 236.

1100 *See* CFA/CU Oct. 15 Comments at 10; CoreComm Oct. 15 Comments at 11; Hyperion Oct. 15 Comments at 11; KMC Oct. 15 Comments at 4, 11; McLeodUSA Oct. 15 Comments at 9. Several commenters cite findings by the California and Texas Commissions concerning Pacific Bell's and SWBT's compliance with section 271 as evidence of SBC's lack of progress in opening its local markets to competition. *See* AT&T Oct. 15 Petition at 21; Focal Oct. 15 Comments at 4-6; Hyperion Oct. 15 Comments at 19-21; KMC Telecom Oct. 15 Comments at 15-16; MCI WorldCom Oct. 15 Comments at 7-8.

1101 Commenters generally cite SBC's numerous appeals of the Texas Commission Arbitration Award requiring SBC to tariff the rates for collocation and its lawsuit challenging the constitutionality of section 271. *See* AT&T Oct. 15 Petition at 14; *see also* CFA/CU Oct. 15 Comments at 14-15; Hyperion at 17; KMC Telecom Oct. 15 Comments at 12; Texas Public Utility Counsel Oct. 15 Comments at 4. Some commenters maintain that SBC's acquisition of PacTel has had a negative impact on competition and consumer service in California. *See* AT&T Oct. 15 Petition at 21, Blitch Aff. paras. 20-22; CFA/CU Oct. 15 Comments at 18; CoreComm Oct. 15 Comments at 7-9; Focal Oct. 15 Comments at 4; Hyperion Oct. 15 Comments at 22-24; MCI WorldCom Oct. 15 Comments at 23, Beach/Fauerbach Decl. at para. 20; KMC Oct. 15 Comments at 18-20. AT&T states, for example, that SBC backtracked from agreements between Pacific Bell and AT&T after the merger with SBC. AT&T Oct. 15 Petition at 20-21, Blitch Aff. at paras. 18-20. Other commenters state that, after the merger, Pacific Bell adopted SBC's policy of refusing to provide the billing and collection services necessary to implement a Calling Party Pays (CPP) program.

specific examples cited by commenters alleging anti-competitive conduct by SBC.[1102] For example, 800 Resale Carriers maintains that, in violation of the Commission's *800 Readyline Orders*, and sections 69.105 and 69.205 of the Commission's rules,[1103] SBC has refused to rebate overcharges imposed upon hundreds of resellers of 800 service dating back to 1986 and amounting to hundreds of millions of dollars.[1104] Further, the Paging and Messaging Alliance of PCIA states that, in violation of specific provisions of the Act, and the Commission's rules, SBC continues to charge CMRS carriers who provide paging services for SBC-originated traffic, and refuses to pay compensation to paging carriers for terminating calls originated by SBC.[1105]

570. SBC responds that many of the allegations cited in the record concern matters that are already being addressed by this Commission, a state regulatory agency, and/or a federal court.[1106] For example, allegations that: (1) Pacific Bell refuses to make available to paging companies interconnection terms and conditions that it has offered to others;[1107] (2) SBC fails to pay reciprocal compensation to Internet service providers and paging providers;[1108] (3) SBC's performance measures are inadequate;[1109] (4) Pacific Bell refuses to provide the billing and collection services necessary to implement CPP;[1110] and (5) SBC has used intellectual property claims to deny new entrants access to network elements,[1111] concern subjects that are currently being considered in other proceedings.

1102 *See* AT&T Oct. 15 Petition at 15,16, 21, MCI WorldCom Oct. 15 Comments, Beach/Fauerbach Aff. at 16. *See also* CFA/CU Oct. 15 Comments at 11,12,15-17; CoreComm Oct. 15 Comments at 7-9; e.spire Oct. 15 Comments, Kallenbach Aff. at 7-9,13,16,18; Focal Oct. 15 Comments at 4-5,5-6; Level 3 Oct. 15 Comments at 22; Hyperion Oct. 15 Comments at 21-22; KMC Oct. 15 Comments at 17; McLeodUSA Oct. 15 Comments at 10.

1103 *See* 800 Resale Carriers Oct. 15 Petition at 6.

1104 800 Resale Carriers Oct. 15 Petition at 6.

1105 PMA Oct. 15 Petition at 4-9. Several commenters also maintain that Ameritech has engaged in anticompetitive practices to forestall local competition in its region. *See* CoreComm Oct. 15 Comments at 4-5; MCI WorldCom Oct. 15 Comments at 4. AT&T submits that, when Ameritech is confronted with a binding and effective regulation or court decision that it strongly dislikes, "it simply defies the law," thereby forcing further litigation of the issue. Commenters cite Ameritech's conduct including shared transport, intraLATA toll dialing parity, reciprocal compensation, and combinations of unbundled network elements as evidence of Ameritech's recalcitrance in opening its local markets to competition. *See* AT&T Oct 15 Petition at 18; MCI WorldCom Oct. 15 Comments at 4-5, Beach/Fauerbach Decl. at paras. 9-10; Time Warner Oct. 15 Comments at 7.

1106 SBC/Ameritech Nov. 16 Reply Comments, App. B at 1 (noting that the claims relating to interconnection for paging companies, performance measures, reciprocal compensation, and unbundled network elements are currently being addressed by this Commission, state public utility commissions, and/or federal courts).

1107 *See, e.g., In re Requests for Clarification of the Commission's Rules Regarding Interconnection Between LECs and Paging Carriers*, CCB/CPD 97-24 (filed Apr. 25, 1997).

1108 *See* App. B at 14 (noting that reciprocal compensation is being considered in CC Docket Nos. 96-98, 95-185).

1109 *In re Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance*, Notice of Proposed Rulemaking, 13 FCC Rcd. 12817 (1998).

1110 *AirTouch Cellular v. Pacific Bell*, No. C.97-12-044 (Cal. PUC filed Dec. 23, 1997).

1111 *See, e.g., In re Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996*, Report and Order, 12 FCC Rcd. 5470 (1997); *In re Petition of MCI for Declaratory Ruling That New Entrants Need Not Obtain Separate Licenses or Right-to-Use Agreements Before Purchasing Unbundled Network Elements*, CC Docket No. 96-98, CCBPol Docket No. 97-4 (filed Mar. 11, 1997).

571. We conclude that none of the foregoing allegations provides a basis for finding that applicants lack the fitness to acquire licenses and authorizations currently held by Ameritech. The Commission has previously stated that typically it will not consider in merger proceedings "matters that are the subject of other proceedings before the Commission because the public interest would be better served by addressing the matter in the broader proceeding of general applicability."[1112] Although it may be true that certain conduct by Applicants had the effect of delaying and minimizing the emergence of competition in their respective local markets, none of these acts were found to be a violation of any law. Thus, we decline to consider them as part of our analysis of SBC's fitness to acquire licenses and authorizations currently held by Ameritech. We emphasize that, in reaching this conclusion, we are in no way condoning actions by an incumbent LEC that have the potential to impede the 1996 Act's goal of facilitating competition in all telecommunications markets. Indeed, as noted below, without SBC's voluntary commitments aimed at opening its local markets to competition, the public interest benefits of the proposed merger would not outweigh the significant public interest harms. We believe that SBC and Ameritech's commitments on issues such as collocation, OSS enhancements, shared transport, and offering of UNEs, and performance measurements, should facilitate the development of competition in the combined SBC/Ameritech region.[1113]

572. Moreover, we also note that many allegations concerning SBC's conduct have been specifically rebutted by evidence proffered by Applicants. For example, SBC points out that the district court granted summary judgment in favor of SBC on AT&T's claim that SBC improperly influenced Ernst & Young to withdraw from providing consulting services for AT&T.[1114]

573. On the basis of the foregoing, there is no basis for concluding SBC's or Ameritech's behavior to date precludes our finding that the proposed license and lines transfers serve the public interest.

G. Requests for Evidentiary Hearing

574. Several commenters in this proceeding request that the Commission designate the proposed merger, or specific issues raised by the merger, for a trial-type evidentiary hearing before an administrative law judge to determine whether approval of the transfer of control request resulting from the proposed merger would serve the public interest.[1115]

1112 *SBC/SNET Order*, 13 FCC Rcd at 21306, at para. 29.

1113 *See* SBC/Ameritech July 1 *Ex Parte*, App. A at 2, 4, 22, and 23.

1114 SBC/Ameritech Nov. 16 Reply Comments, App. B at 21 (citing *Southwestern Bell Telephone Co. v. AT&T Communications of the Southwest, Inc.*, No. 98-CA-4627 (W.D. Tex. Nov. 11, 1998).

1115 *See* CoreComm Oct. 15 Comments at iv, 22; Focal Oct. 15 Comments at ii, 16; Hyperion Oct. 15 Comments at 4, 30, 33, 40; McLeodUSA Oct. Comments at iii, 8,17. Certain commenters, however, do not specifically request an evidentiary hearing, but rather, public hearings where they can present testimony to the Commission. *See* Michigan Consumer Federation Oct. 15 Comments at 3; Parkview Areawide Seniors Oct. 15 Comments, Recommendations for Action at 2; South Austin Oct. 15 Comments, Recommendations for Action at 18.

575. Under the Communications Act, the Commission is required to hold an evidentiary hearing on transfer of control applications in certain circumstances.[1116] Parties challenging an application to transfer control by means of a petition to deny under section 309(d) must satisfy a two-step test.[1117] First, the petition to deny must set forth 'specific allegations of fact sufficient to show that . . . a grant of the application would be prima facie inconsistent with [the public interest];'.[1118] Second, the petition must present a 'substantial and material question of fact.'[1119] If the Commission concludes that the protesting party has met both prongs of the test, or if it cannot, for any reason, find that grant of the application would be consistent with the public interest, the Commission must formally designate the application for a hearing in accordance with section 309(e).[1120]

576. To satisfy the first prong of the test, a petitioning party must set forth allegations, supported by affidavit, that constitute "specific evidentiary facts, not ultimate conclusionary facts or mere general allegations . . .."[1121] The Commission determines whether a petitioner has met this threshold inquiry in a manner similar to a trial judge's consideration of a motion for directed verdict: "if all the supporting facts alleged in the affidavits were true, could a reasonable fact finder conclude that the ultimate fact in dispute had been established."[1122]

577. If the Commission determines that a petitioner has satisfied the threshold standard of alleging a *prima facie* inconsistency with the public interest, it must then proceed to the second phase of the inquiry and determine whether, "on the basis of the application, the pleadings filed, or other matters which [the Commission] may officially notice," the petitioner has presented a "substantial and material question of fact."[1123] If the Commission concludes that the "totality of the evidence arouses a sufficient doubt" as to whether grant of the application

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See also Letter of John C. Gamboa, Executive Director, The Greenlining Institute, to William Kennard, Chairman, FCC, CC Docket No. 98-141 (dated Oct. 27, 1998) (requesting regional public hearings). As indicated above, the Commission did hold a series of public forums at which representatives from these commenting parties could present their views on the proposed merger. *See supra* Section III.B.3 (Commission Review). Although Parkview Areawide Seniors specifically requests that the Commission review the merger's impact on universal service, Lifeline support and tariff offerings targeted towards low income families and senior citizens, Parkview does not assert particular facts that would warrant an evidentiary hearing, and the issues upon which Parkview expresses general concern are encompassed within our public interest determination.

[1116] *See* 47 U.S.C. § 309.

[1117] 47 U.S.C. § 309(d).

[1118] 47 U.S.C. § 309(d)(1); *Gencom Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987); *see Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1562 (D.C. Cir. 1988).

[1119] 47 U.S.C. § 309(d)(2); *Gencom*, 832 F.2d at 181; *see Astroline*, 857 F.2d at 1562.

[1120] 47 U.S.C. § 309(e). *See also WorldCom/MCI Order*, 13 FCC Rcd at 18139-40, para. 202.

[1121] *United States v. FCC*, 652 F.2d 72, 89 (D.C. Cir.1980) (en banc) (*quoting Columbus Broadcasting Coalition v. FCC*, 505 F.2d 320, 323-24 (D.C. Circuit 1974)).

[1122] *Gencom*, 832 F.2d at 181.

[1123] 47 U.S.C. § 309(d)(2). *See also Gencom*, 832 F.2d at 181.

would serve the public interest, the Commission must designate the application for hearing pursuant to section 309(e).[1124]

578. In evaluating whether a petitioner has satisfied the two-part test established in section 309(d),[1125] the D.C. Circuit has indicated that where petitioners assert only "legal and economic conclusions concerning market structure, competitive effect, and the public interest," such assertions "manifestly do not" require a live hearing.[1126] Moreover, in deferring to the Commission's determination not to hold an evidentiary hearing in *United States v. FCC*, the Court stated that "to allow others to force the Commission to conduct further evidentiary inquiry would be to arm interested parties with a potent instrument for delay."[1127] In that case, the D.C. Circuit deferred to the Commission's conclusion that the potential benefits of such a hearing would be outweighed by the delay and its attendant costs.[1128]

579. As an initial matter, we note that some parties seeking an evidentiary hearing in this merger proceeding did not satisfy the procedural requirements of section 309(d)(1).[1129] First, several commenters included their requests for evidentiary hearings in general comments regarding the Application, not in a petition to deny, as section 309(d)(1) requires.[1130] We further note that although JSM Telepage, Inc., Paging & Messaging Alliance, and Time Warner Telecom Corporation have properly filed petitions to deny, these parties failed to support any allegations by affidavits. Finally, some parties have met the procedural requirements of § 309(d)(1) including 800 Resellers Carrier, AT&T, Sprint, and the Texas Office of Public Utility Counsel. We note, however, that a number of issues raised in the record do not reflect disputes over material facts, but rather focus on issues concerning competitive impact of the merger and the public interest. These types of issues "manifestly do not" require a live hearing.[1131]

1124 *Serafyn v. FCC*, No. 95-1385, 149 F.3d 1213, 1216 (D.C. Cir. 1998) (quoting *Citizens for Jazz on WRVR Inc. v. FCC*, 775 F.2d 392, 395 (D.C. Cir. 1985)). A court may disturb the Commission's decision to deny an evidentiary hearing only if, upon examination of the Commission's statement of reasons for denial, the court determines the Commission's decision to be arbitrary and capricious. *Astroline*, 857 F.2d at 1562.

1125 47 U.S.C. § 309(d).

1126 *SBC Communications, Inc. v. FCC*, 56 F.3d at 1496-97 (D.C. Cir. 1995)(quoting *United States v. FCC*, 652 F.2d at 89-90) (affirming the Commission's decision in the *AT&T/McCaw Order* not to hold a full evidentiary hearing before approving the merger). *See AT&T/McCaw Order*, 9 FCC Rcd 5836 at 5927-28, paras. 172-174.

1127 *United States v. FCC*, 652 F.2d at 88-99.

1128 The court deferred to the Commission's judgment not to hold a hearing when the Commission had "on two different occasions, invited interested parties to submit whatever written material they wanted the Commission to consider, and on one occasion heard oral argument en banc on the antitrust issues of the SBS venture." The court further noted that, "all of the business parties to this case, and others, participated in the argument, and submitted materials were voluminous." *Id*, 652 F.2d at 92. Similarly, in this proceeding we note the voluminous record before us, including the numerous comments and ex parte filings we have received and the public forums we have conducted.

1129 *See* 47 U.S.C. § 309(d)(1).

1130 *See* 47 U.S.C. § 309(d)(1).

1131 *See SBC Communications*, 56 F.3d at 1496-97.

580. We conclude that none of the requests for evidentiary hearing has raised a substantial and material question of fact that would require an evidentiary hearing.[1132] The parties dispute the overall competitive impact of the merger and the ultimate public interest determination which, according to the D.C. Circuit, are claims that "manifestly do not" require a hearing.[1133] Certain parties have requested evidentiary hearings to evaluate the Applicants' intra-corporate motives, particularly with respect to Ameritech's plans to enter the St. Louis market.[1134] CoreComm, for example, argues that the Commission "is not bound by the applicants' self-serving statements with respect to their pre-merger competitive plans, but must inspect internal documents and subject the applicants to discovery and cross-examination."[1135] Hyperion argues that "the decision whether the acquiring firm is an actual potential competitor is, in the last analysis, an independent one to be made by the trial court [or the FCC in this case] on the basis of all relevant evidence properly weighed according to its credibility."[1136] To the extent that these requests are grounded in inferences and conclusions to be drawn from Ameritech's plans to enter the St. Louis market, rather than in concrete facts regarding such entry, we note that this is the ultimate task that is before the Commission in making its public interest determination. The Commission extensively investigated the documentary evidence regarding Ameritech's plans to enter the St. Louis market, and made inferences therefrom, in making its determination on the merger's potential public interest harms.[1137] Mere assertions from the commenters of corporate motives, without specific factual allegations, cannot require the grant of a petitioner's request for an evidentiary hearing.

581. We conclude that, even where parties rely on conflicting allegations regarding Ameritech's planned entry into St. Louis, these matters concern the competitive impact of the merger and are not, as asserted, substantial and material questions of fact. Accordingly, we find that no party has satisfied the two-step test set forth in section 309(d),[1138] both procedurally and substantively. The voluminous record before us in this proceeding, including the numerous comments and ex parte filings we have received, and the public forums we have conducted, has provided sufficient evidence to conclude no substantial and material question of fact has been raised and that grant of the Applicants' request, as supplemented with the conditions imposed in this Order, serves the public interest, convenience and necessity.[1139]

1132 *See* 47 U.S.C.§ 309(d).

1133 *See SBC Communications,* 56 F.3d at 1496.

1134 *See* CoreComm Oct. 15 Comments at iv; Focal Oct. 15 Comments at 15, 16; Hyperion Oct. 15 Comments at ii, 4, 33-34.

1135 CoreComm Oct. 15 Comments at iv.

1136 Hyperion Oct. 15 Comments at 33.

1137 *See supra* Section V.B.2C)(1) (Mass Market). *See also* Appendix B (Summary of Confidential Information and Conclusions).

1138 47 U.S.C. § 309(d).

1139 *WorldCom/MCI Order,* 13 FCC Rcd at 18141, para. 205.

IX. ORDERING CLAUSES

582. Accordingly, having reviewed the applications and the record in this matter, IT IS ORDERED, pursuant to Sections 4(i) and (j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the applications filed by SBC Communications and Ameritech Corporation in the above-captioned proceeding are GRANTED subject to the conditions stated below.

583. IT IS FURTHER ORDERED pursuant to Sections 4(i) and (j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the above grant shall include authority for SBC to acquire control of:

a) any authorization issued to Ameritech's subsidiaries and affiliates during the Commission's consideration of the transfer of control applications and the period required for consummation of the transaction following approval;

b) construction permits held by licensees involved in this transfer that mature into licenses after closing and that may have been omitted from the transfer of control applications; and

c) applications that will have been filed by such licensees and that are pending at the time of consummation of the proposed transfer of control.[1140]

584. IT IS FURTHER ORDERED that as a condition of this grant SBC and Ameritech shall comply with the conditions set forth in Appendix C of this Order.

585. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), grant of the SBC/Ameritech Application is subject to the condition that, before or on the same day as the closing of the SBC/Ameritech transaction, Ameritech assign to GTE Ameritech's interest in cellular licensees in those areas identified herein where SBC's and Ameritech's interests currently overlap and that are the subject of the Wireless Telecommunications Bureau's *Memorandum Opinion and Order*, DA 99-1677, granting consent to such assignment.

586. IT IS FURTHER ORDERED that the Section 214 authorizations granted to Ameritech Communications, Inc. (ACI), File Nos. ITC-96-441 and ITC-97-289, are amended, effective upon consummation of Ameritech's merger with SBC, to apply dominant carrier regulation, as specified in Section 63.10 of the rules, to ACI's provision of the authorized services on the U.S.-South Africa route.

1140 *See AT&T/McCaw Order*, 9 FCC Rcd at 5909 n.300; *WorldCom/MCI Order*, 13 FCC Rcd at 18153.

587. IT IS FURTHER ORDERED that the following Section 214 authorizations granted to subsidiaries of SBC are amended to apply dominant carrier regulation, as specified in Section 63.10 of the rules, to their provision of the authorized services on the U.S.-Denmark route effective upon consummation of Ameritech's merger with SBC: Pacific Bell Communications, File No. ITC-96-689; SBC Global Communications, Inc., File Nos. ITC-96-692 & ITC-98-423-T/C; Southwestern Bell Communications Services, Inc., File No. ITC-97-770 (renumbered ITC-214-19971108-00689); SNET America, Inc., File No. 96-172; SNET Diversified Group, Inc., File No. 96-538.

588. IT IS FURTHER ORDERED that pursuant to Section 212 of the Communications Act and Part 62 of the Commission's rules, 47 C.F.R. Part 62, all of SBC's post-merger carrier subsidiaries will be "commonly owned carriers" as that term is defined in the Commission's rules.

589. IT IS FURTHER ORDERED that all motions to accept late-filed comments filed in CC Docket No. 98-141 are GRANTED.

590. IT IS FURTHER ORDERED that all petitions to deny the applications of SBC and Ameritech for transfer of control, and all requests to hold an evidentiary hearing, are DENIED for the reasons stated herein.

591. IT IS FURTHER ORDERED that SBC and Ameritech's request for a blanket exemption from any applicable cut-off rules in cases where Ameritech's subsidiaries or affiliates file amendments to pending Part 22, Part 24, Part 25, Part 90 and Part 101 or other applications to reflect the consummation of the proposed transfer of control is GRANTED.

592. IT IS FURTHER ORDERED that pursuant to section 1.103 of the Commission's rules, 47 C.F.R. § 1.103, this Memorandum Opinion and Order is effective upon adoption.